

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2018

Daverne Michael Foy, *Petitioner*,

vs.

United States of America, *Respondent*.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Rosales-Mireles*, this Court struck down the court of appeals' heightened "shock the conscience" standard for a Rule 52(b) plain error review, and held that such a review is available in ordinary circumstances where the record reflects that the fairness, integrity or public reputation of the judicial proceedings have been affected. Does the trial court's express consideration of non-charged offenses with significantly higher sentencing guidelines that those for which a defendant pled guilty constitute plain error that affects that defendant's substantial rights?
2. Do post-appeal assertions that a waiver of appeal was not fully informed and that the waiver process in the trial court was improperly rushed constitute plain error that affects a defendant's substantial rights?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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**IN THE
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daverne Michael Foy respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A. The Court’s opinion is published at 743 F. App’x 572 (5th Cir. 2018).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on November 29, 2018. [App. A]. The United States Court of Appeals for the Fifth Circuit subsequently issued its Order denying Petitioner’s Petition for Rehearing on January 8, 2019. A copy of this Order appears at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The questions presented involve Federal Rule of Criminal Procedure 52(b) which provides: “A plain error that affects substantial rights may be considered even though it was not brought to the Court’s attention.” Fed. R. Crim. P. 52(b).

STATEMENT OF THE CASE

I. Proceedings below.

This case arises out of Petitioner Daverne Michael Foy's, guilty plea and sentencing related to a single charge of Conspiracy to Distribute and Possession with Intent to Distribute More than 100 kilograms of Marijuana, a violation of 21 U.S.C. §§ 841(a) and (b)(1)(B) and 21 U.S.C. § 846.

The district court sentenced Foy to an upward-variation, above-guideline sentence of 90 months in the custody of the Bureau of Prisons, to be followed by a five-year term of supervised release. Both at the sentencing hearing and in subsequent correspondence, the district court advised Foy that notwithstanding his plea agreement, he had an unqualified right to file an appeal of his sentencing. Foy timely filed his Notice of Appeal, and the Fifth Circuit Court of Appeals subsequently dismissed same, finding his plea agreement to be valid and his statutory right to appeal waived, including his request that the court of appeals conduct a plain error review. [App. A].

II. Statement of facts.

On August 8, 2017, following indictment, Foy accepted responsibility for his actions and pled guilty to Conspiracy to Distribute and Possession with Intent to Distribute More than 100 kilograms of Marijuana. At his sentencing hearing,

the district court ruled on three objections Foy made to his Presentence Investigation Report (“PSR”).

Significant to this Petition, the district court overruled Foy’s objection to his Adult Category Criminal History Score of three, which established a Criminal History Category of II. The score and category were based on Foy’s 1991 convictions for Conspiracy to Possess with Intent to Distribute Cocaine and Marijuana, for which Foy was sentenced by the same district court.

The district court sustained Foy’s objections to the PSR’s Obstruction of Justice two-level enhancement and the PSR’s lack of an Acceptance of Responsibility three-level reduction. With those rulings, Foy’s total sentencing guideline offense level, with the enhancement for a Category II Criminal History, was set at 23, with a Guideline range of 51 to 63 months.

Following the calculation of the Guideline range, the district court sentenced Foy to 90 months in the Bureau of Prisons, an upward-variance of 27 months. Immediately prior to the announcing the sentence, the judge and the prosecutor discussed several factors unrelated to the charge to which Foy had pled guilty and was about to be sentenced. Concerning the Obstruction of Justice allegation, the court, in sustaining Foy’s objection stated:

Okay. I’m going to sustain the objection to -- begrudgingly, I will say. I know it was intentional. You know, it’s just like he’s not involved in the earlier methamphetamines [found in

Bankhead's apartment] and we all know he was up to his neck in it, but he just laid that off on someone else.

[App. C at 10]. In response, the prosecutor recommended the higher end of the 51-63 month Guideline range based on these methamphetamine-related matters for which Foy was not indicted:

Your Honor pointed out something before and I think it bears mentioning again, which is that now the defendant's facing pretty close to the statutory minimum in this case and that the Court has seen the other facts that relate to the indictment and the indictment of his codefendant, as well, and Mr. Foy did avoid, just barely, I'll have to say, being indicted for much more serious offenses. []

And I'm not suggesting that the Court sentence him for crimes he's not been charged with. I think the circumstances, though are important. And, again, the defendant has managed to get himself a good deal, and I recommend the higher end of the guidelines.

[App. C at 12]. Following this exchange, the judge explained his thinking:

The thing that bothers me Mr. Foy, more than anything else -- you make a good statement about what you've been doing and whatnot, but what bothers me is you were doing the same thing in 1990 and you got a good break. You got a sentence that could have given you a lot more, 97 months. All the rest was within the 97, and then, you got a break from the Congress, they reduced your sentence. And then, you violated the terms of your supervised release, brought it in to me, and I continued you and didn't send you back to the penitentiary, and then, you do the same thing again. It's identical with the same person, actually, but that doesn't have anything to do with this sentence. It's just obvious. Just the same person.

That's what bothers me. Then I look at the requirements that I'm supposed to consider in the sentencing and the nature and circumstances of the offense, well, distributing all of that kilos of

marihuana is bad. Your history and characteristics, when you consider this offense, it's bad. It's the same thing you went to the penitentiary before and you just continued it. The seriousness of the offense, it's one of the -- it's a serious offense. Drug running and drug selling is one of the real problems we have in the country, and it doesn't show any respect for the law for you to do the same thing again, as soon as you are through with supervision of the first one.

To figure a just punishment, well, that's something we're discussing. To do a deterrence to criminal law and protect the public from future crimes. Here, I've got a pattern that you've done, same thing, same way, distributing the drugs. How in the world do I know you're not going to try it again?

[App. C at 13-14]. After giving Foy an opportunity to respond, the court announced the 90-month sentence and advised Foy as follows:

[] I'm giving you a letter that tells you, you have 14 days to file a notice of appeal, that is, to tell [trial counsel] to file a notice of appeal if you wish to appeal any of this. You have a plea agreement, but I'm sentencing you over the applicable guidelines that I've calculated. So regardless of the plea agreement, you have a right to appeal. All you have to do is tell your lawyer to file a notice of appeal within 14 days, and he will do so.

[App. C at 17; App. D]. The district court followed up with the above-referenced appeal letter and this appeal followed.

REASONS FOR GRANTING THE PETITION

The district court made clear at Foy's sentencing hearing that it believed Foy had engaged in much more serious crimes than the one he had been charged with and pled guilty to, and that the court was considering these uncharged and significantly more serious offenses, along with their concomitant sentencing guidelines. At that same hearing, the Government encouraged the court's belief, stating that the circumstances surrounding these uncharged crimes were important to consider given that Foy was getting such a good deal under the guidelines for the offense to which he had pled guilty. The district court's consideration of these much more serious and uncharged crimes in sentencing Foy constituted plain error and, similar to the situation in *Rosales-Mireles v. U.S.*, 138 S. Ct. 1897 (2018), requires a remand for a new resentencing hearing free of these improper considerations.

In making its decision to impose an upward variance from the Guidelines range of 51 to 63 months imprisonment and instead impose a 43% upward variation of the sentence to 90 months, the district court relied on its "knowledge" that Foy was responsible for a separate significantly more serious crime involving methamphetamines for which he was not charged. The consideration of this offense and its separate Guideline range constituted plain error because the court considered factors that did not advance the objectives set forth in section

3553(a)(2), were not authorized under section 3553(b), and were not justified by the facts of the case.

In addition to the improper consideration of the methamphetamine offense, the sentence was procedurally unreasonable based on the overemphasis the court placed on Foy's 1991 conviction, about which the court appeared to express remorse for its previous sentencing of Foy. In *Booker*, this Court stated that no single section 3553(a) factor should be weighted more heavily than another. *See U.S. v. Booker*, 543 U.S. 220, 304-05 (2005). The record here shows that in deciding upon the significant upward variance of Mr. Foy's sentence, the district court overemphasized Foy's criminal history factor. As stated on the record, what bothered the court more than *anything* else, was that Foy got a good break in 1991 and then a subsequent "break" from Congress who reduced the sentence for the earlier crime. [App. C at 13].

In *Rosales-Mireles*, this Court recognized that when a defendant is sentenced under an incorrect Guideline range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable possibility of a different outcome absent the error. 138 S. Ct. at 1907 (citing *Molina-Martinez v. U.S.*, 136 S. Ct. 1338, 1345 (2016)). "[A]n error resulting in a higher range than the Guidelines provide usually

establishes a reasonable probability that a defendant will serve a prison sentence that is more than ‘necessary’ to fulfill the purposes of incarceration.” *Id.*

The result, as this Court recently held, is that “[t]he risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because the role the district court plays in calculating the range and the relative ease of correcting the error.” *Id.* at 1908.

A. Standard of review.

This Court has long held that Rule 52(b) review, or a so called “plain error” review, involves four steps, or prongs. *Puckett v. U.S.*, 556 U.S. 129, 135 (2009); *U.S. v. Oliver*, 630 F.3d 397, 411 (5th Cir. 2011). First, there must be an error or defect—some sort of “deviation from a legal rule”—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived by the defendant. *Puckett*, 556 U.S. at 132-33. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. *See id.* at 134. Third, the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it “affected the outcome of the district court proceedings.” *Id.* at 135. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error “seriously affect[s] the fairness, integrity or public reputation of judicial

proceedings.” *Id.* at 135. When reviewing under a plain error standard, the court may consult the whole record when considering the effect of any error on substantial rights. *U.S. v. Vonn*, 535 U.S. 55, 59 (2002).

B. The district court’s consideration of factors outside those permitted by 18 U.S.C. § 3553 was plain error.

At Foy’s sentencing hearing, the district court, in open court, informed Foy that “we all know that he [Foy] was up to his neck in it [the methamphetamines found in a co-defendant’s apartment].” [App. C at 10]. For his part, in response to the court, the prosecutor encouraged the consideration of these factors, stating that Foy barely escaped being indicted for these much more serious offenses and that these circumstances are important for the court to consider.

In this same exchange, likely realizing that these considerations were outside the scope of section 3553, the prosecutor stated, “[a]nd I’m not suggesting that the Court sentence him for crimes he’s not been charged with. I think the circumstances, though, are important.” [App. C at 12].

1. The court’s consideration of an uncharged offense and its sentencing guidelines was outside the factors the court could consider under 18 U.S.C. § 3553, which constitutes a “deviation from a legal rule” under the plain error review.

18 U.S.C. § 3553 is clear as to what factors shall be considered by the district court when imposing a sufficient sentence. In addition to the nature and circumstances of the charged offense and the history and characteristics of the

defendant, the court shall consider the following concerning the need for the sentence imposed:

1) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) the need for deterrence; (3) the need to protect the public; (4) the need to provide the most effective correctional treatment or medical care; (5) the nature and circumstances of the offense; (6) the history and characteristics of the defendant; (7) the Sentencing Guidelines range; and (8) the need to avoid sentencing disparities.

18 U.S.C. § 3553.

Because the sentence in this matter is outside the applicable Guidelines range, in considering whether the district court has adhered to section 3553, it must be determined whether the sentence departed from the applicable Guidelines range based on a factor that 1) does not advance the objectives set forth in section 3553(a)(2) or 2) is not authorized under section 3553(b) or 3), is not justified by the facts of the case. *See* 18 U.S.C. § 1742(e)(3)(B).

In the present case, the district court, in open court, candidly acknowledged exactly what was bothering him as he was imposing the 27-month upward variance from the Guidelines range for Foy's marijuana offense. [App. C at 13-14]. The court's focus at sentencing on the methamphetamine found in Foy's co-defendant's home, and the court's definitive knowledge that "we all know that [Foy] was up to his neck in it," was a legal deviation from the factors set out in section 3553. Consideration of an uncharged offense and the punishment that could have been

applicable had he been indicted on such a charge is outside the scope of section 3553.

The prosecution's comments leave little to doubt concerning the significance of this conversation. In encouraging the court sentence Foy at the upper limit of the guidelines (63 months), the prosecution stressed that because Foy had almost been sentenced to "much more serious offenses," the circumstances of those uncharged offenses were important for the court to consider. [App. C at 12].

Viewing the transcript of the sentencing hearing in its entirety, it is clear that the district court considered these uncharged factors and that the prosecution encouraged same. As such, the district court considered factors which did not advance the objectives set forth in section 3553(a)(2), was not authorized under section 3553(b) and was not justified by the facts of the case. *See* 18 U.S.C. § 1742(e)(3)(B). As such, the first prong of the plain error test is met.

2. The court's error in considering a much more serious offense that Foy was not charged with was clear and obvious as evidenced by the prosecutor's contemporaneous exculpatory statements.

The second prong of the plain error test requires that the legal error be clear and obvious, rather than subject to reasonable dispute. *Puckett*, 556 U.S. at 134. In the present case, the prosecution provides the best evidence of the clear and obvious nature of the legal error with his exculpatory statement made while simultaneously encouraging the court to go ahead and consider the circumstances

of the uncharged offense, “I’m not suggesting that the Court sentence him for crimes he’s not been charged with.” [App. C at 12].

The fact that the prosecution itself felt the need to state on the record that it was not suggesting that the district court sentence him for uncharged crimes amply evidences that the legal error was clear and obvious, and not subject to reasonable dispute. [*See id.*]. Therefore, the second prong of the plain error test is satisfied.

3. The court’s error affected Foy’s substantial rights by contributing to the upward variance of 43% over the Guidelines range.

The third prong of the plain error test is that the legal error must have affected the Foy’s substantial rights, which in the ordinary case means he must demonstrate that it “affected the outcome of the district court proceedings.” *Puckett*, 556 U.S. at 134. Here, Foy went into the sentencing hearing with a recommendation from the prosecution for a sentencing on the high end of the sentencing Guidelines, the maximum being calculated at the hearing of being 63 months in the Bureau of Prisons.

Following the consideration of the uncharged methamphetamine offense and the encouragement of prosecution to do so at the sentencing hearing, the district judge sentenced Foy to a sentence that was a 43% upward variance from the maximum 63 months under the Guidelines. A twenty-seven month, 43% upward variance from the Guidelines can fairly be considered to have affected Foy’s substantial rights. Although there were other factors articulated by the district

court in its order and Statements of Reasons, the factors that were contemporaneously discussed at the sentencing hearing provide evidence that those factors played a part in the sentencing as well. As such, the third prong of the plain error test is met.

4. The court's error affects the fairness, integrity, and public reputation of the judicial proceedings below.

The fourth and final prong of the plain error test requires that the legal error affect the fairness, integrity, and public reputation of the judicial proceedings below. *Puckett*, 556 U.S. at 136. In the record below, the transcript of Foy's sentencing hearing clearly shows the district court and prosecutor engaging in a discussion about the sentence Foy *could* have received had he been charged with a much more serious methamphetamine offense, and that the court *should* consider those facts when he was sentencing Foy for the offense to which he pled guilty.

Although the prosecution qualified his recommendation by stating that he was not encouraging sentencing based on the more serious offense, he nonetheless asked the court to consider the offense which the court discussed quite forcefully on the record.

Because the legal error of considering uncharged offenses and their sentencing guideline range necessarily affects the fairness, integrity, and public reputation of the judicial proceedings below, the fourth and final prong is met.

C. Foy's post-appeal communications with appellate counsel concerning the rushed nature of the process and his waiver not being fully informed requires remand.

Following the issuance of the court of appeals' opinion, Foy shared several handwritten documents with undersigned appellate counsel including some that appear to be communications with his then-trial counsel at or about the time of his waiver and sentencing. Those communications, which are not in the record below, raise concerns about the perceived rushed nature of the process and Foy's belief that his waiver was not fully informed. While these communications contradict Foy's statements to the trial court regarding his understanding at the time of sentencing, undersigned counsel was obligated to raise these newly-raised concerns in Foy's Petition for Panel Rehearing and in this Petition for Writ of Certiorari.

If Foy's waiver was not fully informed, then the plain-error standard was met in this case when the district court 1) made statements that it affirmatively believed that Foy had engaged in much more serious crimes than the one he was being charged with, and 2) then affirmatively considered these uncharged and significantly more serious offenses, along with their concomitant sentencing guidelines. The record below shows that the government encouraged the court's belief, stating that the circumstances surrounding these uncharged crimes were important to consider given that Foy was getting such a good deal under the

guidelines for the offense to which he had pled guilty. The district court's consideration of these much more serious and uncharged crimes in sentencing Foy constituted plain error and the failure of the court of appeals to address that plain error, as required by *Rosales-Mireles*, must be reversed.

Additionally, if Foy's waiver was not fully informed, the district court's imposition of a procedurally and substantively unreasonable above-guidelines sentence upon Foy should be reviewed. In making its decision to impose an upward variance from the Guidelines range of 51 to 63 months imprisonment, and instead impose a 43% upward variation of the sentence to 90 months, the court relied on its "knowledge" that Foy was responsible for a separate, significantly more serious crime involving methamphetamines for which he was *not* charged. The consideration of this offense and its separate Guidelines range constituted plain error because the court considered factors that did not advance the objectives set forth in section 3553(a)(2), were not authorized under section 3553(b), and were not justified by the facts of the case.

Likewise, if Foy's waiver was not fully informed, then the imposed sentence was procedurally unreasonable based on the overemphasis the court placed on Foy's 1991 conviction, about which the court appeared to express remorse for its previous sentencing of Foy. In *Booker*, this Court stated that no single section 3553(a) factor should be weighted more heavily than another. 543 U.S. at 304-05.

As stated on the record, what bothered the sentencing court more than *anything* else was the court's perception that Foy got a good break in 1991 and then a subsequent "break" from Congress, which reduced the sentence for the earlier crime. [App. C at 13]. The trial court's overemphasis further demonstrates the procedural unreasonableness of Foy's sentence.

CONCLUSION

For these reasons, Foy respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted,

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